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CITY AND COUNTY OF SAN FRANCISCO
(Including SAN FRANCISCO DEPARTMENT OF BUILDING
INSPECTION, SAN FRANCISCO BUILDING
INSPECTION COMMISSION, and
SAN FRANCISCO PLANNING DEPARTMENT)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

REGAN CARROLL TRUST, Regan
Carroll, Trustee,

Plaintiff,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, SAN FRANCISCO
DEPARTMENT OF BUILDING
INSPECTION, SAN FRANCISCO
BUILDING INSPECTION
COMMISSION, and SAN FRANCISCO
PLANNING DEPARTMENT,

Defendants.

Case No. C-07-2577 SBA

**CITY'S NOTICE OF MOTION AND
MOTION TO DISMISS FIRST
AMENDED COMPLAINT FOR LACK
OF JURISDICTION AND FAILURE
TO STATE A CLAIM, TO STRIKE
THIRD COUNT OR, IN THE
ALTERNATIVE, FOR SUMMARY
JUDGMENT**
[FRCP 12(B)(1); 12(B)(6); 12(F); 56]

Hearing Date: February 5, 2008
Time: 1:00 p.m.
Place: Courtroom 3, 3rd Floor

Trial Date: TBA

PLEASE TAKE NOTICE that on February 5, 2008 at 1:00 p.m., or as soon thereafter as the
matter may be heard in the above-entitled court, located at 1301 Clay Street, Courtroom 3, 3rd Floor,
Oakland, California, Defendant City and County of San Francisco (sued herein as the City and
CITY'S MOT TO DISMISS AMENDED COMPLAINT
CASE NO. C-07-2577 SBA

1 County of San Francisco, San Francisco Department of Building Inspection, San Francisco Building
2 Inspection Commission, and San Francisco Planning Department; collectively "City") will and hereby
3 does move the Court to dismiss the First Amended Complaint ("Complaint") filed in this action
4 pursuant to FRCP 12(b)(1), 12 (b)(6) or, in the alternative, for summary judgment pursuant to FRCP
5 56. This motion is made on the grounds that the Complaint fails to state a claim for which relief can
6 be granted, and some or all of the claims set forth in the Complaint are not ripe for review.

7 This motion is made on the following grounds:

8 The Complaint fails to state a claim for relief pursuant to 42 U.S.C. §1983 in that Plaintiff has
9 failed to allege *facts* establishing (1) acts by the defendants (2) under color of state law (3)
10 depriv[ed][it] of federal rights, privileges or immunities [and] (4) caus[ed][it] damage. Moreover, the
11 court must apply the highly deferential "rational basis" standard of review to Plaintiff's claims.
12 Because the proposed project did not comply with existing local law at the time Plaintiff sought its
13 issuance, the City's refusal to issue the requested permit was rationally based.

14 Plaintiff's claims are also barred on the basis of *res judicata* and collateral estoppel, because
15 Plaintiff failed to seek state judicial relief from the administrative decisions it now challenges, and
16 those determinations must now be accorded preclusive effect. In addition, Plaintiff's §1983 claims
17 are barred by the statute of limitations, since those claims are premised on alleged actions by the City
18 that Plaintiff claims occurred prior to June, 2001.

19 Alternatively, the Complaint sets forth claims which are not ripe for review, since the
20 Complaint does not allege that the City has taken final action with respect to Plaintiff's building
21 permit application. In fact, at Plaintiff's request, the City's Board of Appeals continued the hearing of
22 Plaintiff's claims relating to the City's denial of a building permit for one year, and has taken no
23 further action thereon.

24 Plaintiff's newly added Third Count, based on alleged retaliatory delays in processing
25 Plaintiff's permit application since the filing of this and other lawsuits against the City, fails for the
26 same reasons set forth above. Additionally, the permit application for Plaintiff's property was
27 disapproved—at Plaintiff's request—in December 2006. Plaintiff has not submitted an application for
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1 certificate of appropriateness, or otherwise attempted to recommence the processing of that permit
2 application. Similarly, City records reflect that all permit applications associated with Plaintiff's other
3 property (located at 1169 Tennessee Street) that were pending at any time on or since the date of
4 Plaintiff's first state court petition have been issued by the City. The Court need not accept as true the
5 unsupported conclusions of the Complaint in light of these judicially noticeable facts to the contrary.

6 Finally, the newly alleged "Third Count" should be stricken. The allegations contained in
7 Paragraphs 25-28 of the First Amended Complaint includes alleged conduct by the City "in retaliation
8 for Plaintiff filing this action." As such, the new count amounts to a supplemental, rather than
9 amended pleading. Such pleadings require leave of court, which was not sought in this case.

10 The motion to dismiss is made based on this Notice of Motion and Motion, the Memorandum
11 of Points and Authorities filed in this action, the City's request for judicial notice in support of the
12 motion, the pleadings and papers on file with this Court, and such other matters as may be presented
13 to the Court at the time of hearing.

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15 Dated: December 14, 2007

16 DENNIS J. HERRERA
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22 By: 
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